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Supreme Court, U.S.
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No. 01-1685

In The

# Supreme Court of the United States

RHADAMES CHAVEZ,

*Petitioner,*

*v.*

UNIVERSAL MARITIME SERVICE CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether when a ruling by the administrative law judge that an injured employee is fully recovered is based on an employer sponsored examination, the employee has been refused treatment by the employer and is entitled to reimbursement of reasonable medical expenses incurred for continued treatment with employee's physician authorized by the employer pursuant to Sec 907 under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.A. Sec. 901 *et seq.*

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, under permanent partial disability relating to a loss of use of a body part, what factors determine whether benefits are calculated under 908(c)19 or (c)21?

3. Whether it is a violation of due process for review boards in the federal system to remand a case to the same administrative judge. Is there not a presumption of vindictiveness or loss of objectivity on the part of the reversed judge?

## TABLE OF CONTENTS

Questions Presented ..... *1*
Table of Contents ..... *ii*
Table of Cited Authorities ..... *iii*
Counterstatement ..... 1
Argument ..... 5
I. The ALJ Did Not Give The Proper Weight To The Authorized Treating Physicians' Findings And Petitioner's Subjective Complaints And, Thus, Misapplied The Purpose And Spirit Of The Act ..... 5
II. There Is Confusion Among The ALJs, Boards, And The Circuits In the Interpretation Of The Act In Classifying Permanent Partial Disability ..... 7
III. The Tone Of The ALJ'S Opinion Demonstrated an "Unshakable Commitment" To The Denial Of The Worker's claims ..... 8
Conclusion ..... 9

## TABLE OF CITED AUTHORITIES

**Cases**:

*Consolidated Edison Co. v. NLRB*,
305 U.S. 107 (1938) ..... *5*
*Cotton v. Newport News Shipbuilding & Dry Dock Co.*,
23 BRBS 380 (1990) ..... 6
*Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*,
192 F.2d 968 (CA4 1951) ..... 5
*Northcutt v. Califano*, 581 F.2d 164(CA8 1978) ..... 5
*Old Dominion Stevedoring Corp. v. O'Hearne*,

218 F.2d 651 (CA4 1955) ..... 5
*Potomac Electric Power Co. v. Director*,
449 U.S. 268(1980) ..... 7
*Sarchet v. Chater*, 78 F.3d 305(CA& 1996) ..... 8
*Sir Gean Amos v. Atlas Tile & Marble, Inc. v. Director*,
164 F.3d 780 (CA9 1999) ..... 6
*Withrow et al. v. Larkin*, 421 U.S. 35 (1975) ..... 8

**Statutes:**

33 U.S.A. Sec 901 *et seq* ..... 5

33 U.S.A. Sec. 908 (c)19 ..... 7

33 U.S.A. Sec. 908 (c)21 ..... 7

## COUNTERSTATEMENT

Petitioner labored more than 32 years on the docks. He "never had any prior injuries to his neck, shoulder or right arm" until a big chunk of ice barreled down from a high crane and struck him on March 11, 1996. Pet.App.27a, 39a.

Petitioner did not leave his job that day despite the severe impact and pain he experienced. He wanted to work to support his family and do his job and had through the years worked as much overtime as possible. He never wanted to miss work. Id. at 40a. It was not his intention to apply for anything. Petitioner thought that the pain may go away. But after two days of severe pain, petitioner could no longer continue working and sought medical help from Dr. Guillermo Munoz. Id. at 37a-38a.

The ALJ judge discounted both treating physicians' findings and relied on employer-retained Dr. Steven Nehmer who opined that "the fact that he [petitioner] remained at work that day and did not seek medical attention" indicated he was not hurt since a "person would not wait three days to seek medical attention." The ALJ based primarily on Dr. Nehmer's opinions, found petitioner was not "creditable" and engaged in "symptom magnification." Id. at 51a-52a, 59a-60a.

On April 1, 1996, (two weeks after the injury and while in the care of Dr. Munoz), petitioner was given an employer-sponsored examination by Dr. Nehmer. Dr. Nehmer, in his report, accused petitioner of "symptom magnification" Id. at 49a. Dr. Nehmer discounted the diagnosis of the treating physician, Dr. Munoz, i.e., acute severe spine strain, acute severe right shoulder sprain and radiculothopy due to the accident. Dr. Nehmer opined petitioner needed no treatment and "could return to work" on April 1st. Id. at 49a.

On April 26, 1996, Dr. Munoz confirmed that petitioner also suffered from carpal tunnel syndrome on both sides, a

condition petitioner had never suffered before the impact of the ice. After three days on the job, he just could not continue with the pain and sought an authorized specialist to help him.

On May 14, 1996, petitioner was examined by Dr. Bradley, his new employer authorized treating physician. On May 21, 1996, Dr. Bradley found, via the MRI objective evidence, multi-level degenerative disc changes throughout the cervical spine;mild surface bursal surface fraying involving the right shoulder and of a prior Hill-Sachs fracture. Dr. Bradley concluded that petitioner's injury aggravated preexisting changes and prescribed a rehabilitation program.

On June 3, 1996, while petitioner was under the authorized treatment with Dr. Bradley, Dr. Nehmer conducted yet another employer-sponsored examination. Petitioner told Dr. Nehmer that his condition improved with physical therapy. Dr. Nehmer noted paresthesias and confirmed carpal tunnel syndrome. Dr. Nehmer opined that the carpal tunnel syndrome was not related to the March 11th contusion petitioner suffered. Id. at 49a. Dr. Nehmer noted a decrease in pain and the increase in range in motion of the neck. He acknowledged that physical therapy may have been a factor in these changes but also, time, or a "decrease in symptom magnification." Id. at 52a.

Dr. Nehmer did find that there were degenerative changes in petitioner's shoulder but the doctor did not see any aggravation by the impact (of a big chunk of ice barreling down from a high crane] to this condition. Dr. Nehmer did not find evidence of a Hill-Sachs fracture. Id. at 521-53a.

On June 11, 1996, Dr. Bradley noted improvement with the therapy and released petitioner to work as of June 16, 1996 and continued to treat him through February 1997.

On July 8, 1996, Dr. Raymond Koval from the Labor Department noticed tenderness on the right side of neck-shoulder and upper trapezius fibers on the right (as did petitioner's treating physicians). However, Dr. Koval found no

work-related injury. Dr. Koval found no sign of carpal tunnel syndrome either [contradicting Dr. Nehmer]. Id. at 50a.

But agreeing with treating physician,Dr. Bradley, Dr. Koval noted a prior Hill-Sachs fracture thus, again contradicting. Nehmer who did not find a Hill-Sachs fracture.

Later on appeal, the Review Board ("Board") remanded the case back to the ALJ because "Dr. Koval's opinion does not support the termination of benefits" as of May 22, 1996, the date the ALJ had first ruled as the cut-off date. Id. at 29a.

On October 2, 1996 , Dr. William Tevlin and Dr. David H. Myers several months after the accident found a permanent orthopedic disability of 21% impairment of the whole person.

On February 2, 1997, Dr. Bradley noted more pain the impacted areas, worsening of numbness of petitioner's index and middle fingers and increased pain on the base of his neck. Dr. Bradley continued to treat plaintiff through February 1997.

In November 1997, petitioner was transferred to a desk job. Stanley Lysick employed by respondent employer, testified that petitioner "works in an office because his performance as a hatch checker was well below standard" and cost the company money. Id. at 45a. Petitioner testified he was not as quick as he used to be because of his injury and he made errors.

As a clerk, petitioner continued to have pain in his shoulder, arm and hand and difficulty in twisting his neck. He had trouble punching information in the computer in his new position. Id. at 39a. Mr. Lysick acknowledged that petitioner's pay as a clerk was lower because "a checker could work as many hours as he wanted to. A clerk is limited in the number of hours he works, limiting Mr. Chavez's pay." Id. at 46a.

Based on the first employer-sponsored examination report by Dr. Nehmer, respondents refused petitioner's medical and disability benefits in the middle of authorized treatment on April 1, 1996. This cut-off date was while petitioner was being treated by Dr. Munoz and later by Dr. Bradley. On May 10,

1996, the employer had given written authorization for continued treatment with Dr. Bradley.

The ALJ relied heavily on the employer-retained Dr. Nehmer's findings and to Dr. Koval's opinion stating that "[i]t was obvious that Doctor Nehmer and Dr. Koval[whom the Board later discounted] presented compelling and well-reasoned evidence, specifically their range of motion studies, that Mr. Chavez[']s disability relative to the accident of March 11, 1996 ended April 1, 1996." App. 64a.

On July 14, 1998, the ALJ awarded temporary total disability and medical benefits until May 22, 1996, but not the requested June 17th when petitioner's treating physician released him to go to work. The ALJ ignored the objective medical findings of petitioner's treating physicians and the subjective complaints of the petitioner to his treating physician to allow for full treatment.

As to permanent partial disability, the ALJ merely stated "the Act does not make a provision for a "whole person" impairment rating pursuant to a schedule." Id. at 57a.

The Board noted on the first appeal that the ALJ did not "explicitly determine whether claimant has established his entitlement to partial disability payments." However, the Board did not remand the partial disability issue for further analysis.

On August 17, 1998, the Board vacated the cut-off date of May 22, 1996 because it questioned Dr. Koval's findings on which the ALJ gave "great weight" and the fact the ALJ did not "address Dr. Bradley's recommendation that claimant undergo physical therapy and his judgment that such therapy was beneficial to claimant, or his subsequent treatment of claimant." Id. at 29a, 32a, 56a.

The ALJ also discounted petitioner's subjective complaints as "symptom magnification" and, moreover, did not consider the combined effects of the injury. Petitioner continues to suffer and seeks relief.

## ARGUMENT

*In view of its beneficient purposes, Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Sec.901 et seq. must be given broad and liberal construction in conformance with its purpose. The Act must be liberally construed in favor of the employee and any doubts should generally be in favor of the injured worker. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (CA4 1951); Old Dominion Stevedoring Corp. v. O'Hearne, 218 F.2d 651 (CA4 1955).*

### I. THE ALJ DID NOT GIVE THE PROPER WEIGHT TO THE AUTHORIZED TREATING PHYSICIANS' FINDINGS AND PETITIONER'S COMPLAINTS AND MISAPPLIED THE PURPOSE AND SPIRIT OF THE ACT.

Despite respondents assertions, it is evident that this petition was filed because the ALJ did not weigh the evidence properly and arrived at erroneous factual conclusions. Petitioner does not claim that employer-sponsored medical examinations are invalid "as a matter of law." (Resp. P.12). But, rather, pursuant to the meaning of the Act, more weight must be given to a treating physicians' findings based on objective findings and the subjective complaints of their patients. The Supreme Court directed that "[w]e afford greater weight to a treating physician's opinion because he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Consolidated Edison Co. v. NLRB*, 305 U.S. 107, 229 (1938). Even if , *arguendo*, there was no objective evidence, in *Northcutt v. Califano*, 581 F.2d 164, 166-167 (CA8 1978), the Eight Circuit, held that the "ALJ may not disregard the claimant's subjective complaints of pain simply

because there is no objective evidence in support of such complaints."

The ALJ would not see past the "symptom magnification" accusations of employer doctor, Dr. Nehmer and the fact petitioner did not run to a doctor right after the injury. The ALJ did not consider the continued treatment necessary according to the treating physician even after petitioner returned to work. "[a] claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remained in need of treatment for his work injury.*Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Dr. Nehmer assigned gradations of "symptom magnification." Later on, Dr. Nehmer opined that petitioner engaged in a "decrease of symptom magnification."(emphasis added). Does this mean that the doctor admits that petitioner was indeed injured?

Respondents ( Resp. p.14) evidently overlooked the case in the petition ( Pet. p.13) *Sir Gean Amos v. Atlas Tile & Marble, Inc. v. Director, 164 F.3d 780 (CA9. 1999).*

Using a *res ipsa loquitur*-type argument, when a large chunk of ice comes barreling down from a high crane and hits one's neck and shoulder, it is not so farfetched to opine that such an impact caused the poor soul to hurt badly *if not killed* and to aggravate of any preexisting condition. Moreover, petitioner developed injury to his arm and hand after the injury.

This Court should give pause as to the credibility of such findings which are based on buzz words and the unsupported conclusion that a person is not hurt if he does not run for medical aid immediately. The ALJ did not liberally construe the statute in conformance with its purpose and weigh the evidence in favor of the employee as mandated by The Act.

## II. THERE IS CONFUSION AMONG THE ALJ'S, BOARDS, AND CIRCUITS IN THE INTERPRETATION OF THE ACT IN CLASSIFYING PERMANENT PARTIAL DISABILITY.

Respondent misunderstands petitioner's position in this issue. The court of appeals did not address permanent partial disability. The ALJ stated, in discounting this claim, "the Act does not make a provision for a "whole person" impairment pursuant to a schedule." Pet. App. 57a. Also, the Board found that the ALJ "did not explicitly determine whether claimant established his entitlement to partial disability benefits." Thus, the issue is before the Court.

Twenty-two years ago, this Court in *Potomac Electric Power Co. v. Director*, 449 U.S. 268(1980) reading the Act strictly ruled that "[we] are not free to read this language as though it granted the employee an election" between scheduled and non-scheduled injuries. But, the Act with its beneficent purpose, surely would allow for employees, if applicable, to choose what category is most advantageous for them financially, 908(c)19 or (c)21 or even the whole people's impairment. Otherwise the Act would be discriminatory and defeat its own purpose. In his dissent in *Potomac*, Justice Blackman, focused on the purpose of the Act and urged adoption of "a liberal construction of the statute so as to avoid the amazingly incongruous result approved by the Court."

Moreover, petitioner's injury to his neck and shoulder caused a partial loss of his arm and hand. If, hypothetically, he had not lost income in his transfer, there is still a conflict in the courts as to whether petitioner is entitled to benefits under the schedule for the partial disability of his arm and hand arising from a neck and shoulder injury. There is nothing in Sec. 908 and (c)19 that mandates scheduled injuries resulting from non-scheduled injuries to be excluded.

Moreover, since petitioner suffered injuries throughout including the aggravation of preexisting conditions, the whole person analysis would be appropriate.

Thousands of dedicated injured workers are deprived of benefits because either they did not lose income or their injuries do not fit into cubby-holes.

## III. THE TONE OF THE ALJ'S OPINION DEMONSTRATED AN "UNSHAKABLE COMMITMENT" TO THE DENIAL OF THE WORKER'S CLAIMS.

Throughout his opinion, the judge overly accused petitioner of "symptom magnification" then "decreased symptom magnification" fancy words for "lying". Throughout his opinion he called the petitioner in essence a liar, i.e., a malingerer. This worker was hit by a big chunk of ice at high speeds from a high crane and the ALJ accuses this worker of lying. The ALJ blindly gave great weight to the employer's doctors who actually disagreed on important issues and discounted the treating physicians' opinion and treatment plan.

In *Sarchet v. Chater*, 78 F.3d 305(CA& 1996), the Court observed that '[the tone of the administrative law judge's opinion suggests she may have an unshakable commitment to the denial of this applicant's claim." In *Withrow et al. v. Larkin*, 421 U.S. 35 (1975), this Court reiterated that [n]ot only is a biased decisionmaker constitutionally unacceptable but, "our system of law has always endeavored to prevent even the probability of unfairness."

The facts reveal at least an appearance of impropriety as to the ALJ's findings. On remand, the ALJ was "unshakable" in a decision that undermined the purpose of the Act.

## CONCLUSION

This case presents serious recurring questions that affect and have affected the health and welfare of thousands of workers. Petitioner has come this far to respectfully and fervently request this Court grant Certiorari to insure hardworking workers injured on the job receive the benefits to which they are entitled under the Act.

Respectfully submitted,

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